Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

ROBERT JOHN VAN ZANDT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT BRETTSCHEIDER*
Attorney at Law
80-02 Kew Gardens Road
Suite 701
Kew Gardens, New York 11415
(718) 575-2929

Attorney for Petitioner
**Counsel of Record*

APPELLATE ADVANTAGE
POST OFFICE BOX 7506◆KANSAS CITY, MO 64116◆816-453-2424

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QUESTION PRESENTED

Whether the Petitioner's constitutional right to due process of law was violated by the district court's upward departure in sentencing the Petitioner, where the court did not conduct an evidentiary hearing to determine whether the Petitioner knowingly endangered the solvency of one or more victims and based its decision on mere speculation and where the court did not have the authority to upwardly depart?

LIST OF PARTIES

Petitioner Robert John Van Zandt is the only party seeking review of the judgment below.

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The Petitioner, Robert John Van Zandt, ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the September 25, 1998 decision and order of the United States Court of Appeals for the Second Circuit, denying the Petitioner's appeal of the sentence imposed by the United States District Court for the Southern District of New York.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Second Circuit, denying the Petitioner's appeal of his sentence, will not be published in the Federal Reporter. It is reproduced in the Appendix at A-1. The order of Judge Barrington D. Parker of October 2, 1997 is reproduced in the Appendix at B-7.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). The Second Circuit decision denying the Petitioner's appeal was entered in the court's docket on September 25, 1998.

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[Sections 2-5 omitted]

United States Sentencing Guidelines, Section 2F1.1, application note 10(f)[1]

Reproduced in the Appendix at H- .

United States Sentencing Guidelines, Section 6A1.3

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing

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[1] Application Note 10(f) of Section 2F1.1 of the United States Sentencing Guidelines, which the court relied on to upwardly depart in sentencing the Petitioner, is designated as Application Note 11(f) in the 1998-1999 Edition of the Federal Sentencing Guidelines Manual.

determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

STATEMENT OF THE CASE

On May 21, 1997, the Petitioner plead guilty to two counts of mail fraud in violation of 18 U.S.C. Sec. 1341. On October 23, 1997, the Petitioner was sentenced in the United States District Court for the Southern District of New York (Parker, J.) to fifty five (55) months of imprisonment, three years of supervised release, restitution in the amount of $1,568,100 and a special assessment of $100.00. The plea agreement entered into by the Petitioner provided for a sentence of incarceration of 30 to 37 months. However, the district court departed upward by 18 months pursuant to United States Sentencing Guidelines Section 2F1.1, application note 10(f). The Petitioner timely filed a notice of appeal to the United States Court of Appeals for the Second Circuit on October 31, 1997, appealing the district court's upward departure. In a decision and order dated September 25, 1998, the Second Circuit affirmed the Petitioner's judgment and sentence.

A. Plea Agreement

The Petitioner entered into a plea agreement with the government where he agreed to plead guilty to two counts of mail fraud in violation of Title 18, United States Code Section 1341. According to the plea agreement, the Petitioner would receive a sentence of incarceration between 24 to 30 months. This figure reflected a base offense level of 6 under Section

2F1.1 of the United States Sentencing Guidelines (hereinafter "U.S.S.G.")which was increased by 11 points because of the amount of the fraud. An additional two points were added pursuant to U.S.S.G. Sec. 2F1.1(b)(2) because the offense involved a scheme to defraud more than one victim and involved more than minimal planning. The Petitioner was to receive a three level decrease for acceptance of responsibility pursuant to U.S.S.G. Sec. 3E1.1. This resulted in a total offense level of 16 and a criminal history category of II which carried a sentence range of 24 to 30 months. The agreement also provided that Petitioner would make restitution in the amount of $1,568,100.00. The plea agreement also provided that the Petitioner "may move for a downward departure based on his gambling addiction and his extremely early notification of his willingness to enter a plea of guilty." Apdx C-35-40.

B. Sentencing Proceedings

Prior to the Appellant's sentencing, Judge Barrington D. Parker notified the parties, in an order dated October 2, 1997, that it was considering an upward departure pursuant to U.S.S.G. Sec. 2F1.1 Application note 10(f). Apdx B-7. This section of the Guidelines provides for an upward departure in cases where "the offense involved the knowing endangerment of the solvency of one or more victims." U.S.S.G. Sec. 2F1.1, application note 10(f). The Appellant responded to the court order through his counsel, in a letter dated October 16, 1997,

wherein the Appellant objected to this upward departure since "none of the investors qualify as to endangerment of insolvency." The Appellant stated that after the Court read what the Appellant had to say about each investor in his letter, "a Fatico hearing might be necessary, since the Court cannot make an upward departure under Section 2F1.1 [Application note 10(f)] based on speculation, but should be on sworn testimony. *See,* United States v. Needle, 72 F.3d 1104 (3d Cir. 1995)" The Appellant also addressed the financial situation of each victim who had submitted a letter to the Court, explaining that none of these victims had been left destitute by the actions of the Appellant. In fact, most of these victims had submitted letters to the court requesting that Appellant not receive a jail sentence so that he would be able to make restitution to the victims. Apdx C-8-14.

On October 20, 1997, when the case was initially scheduled for sentencing, the Petitioner argued that none of the victims had been placed in a precarious financial position or became destitute as a result of Appellant's actions in order to warrant an upward departure. In addition, Appellant argued that in negotiating the plea agreement entered into by the Appellant, the government took into consideration all of the victims but most importantly, the tremendous cooperation by the Appellant in this case. This resulted in the government agreeing not to seek an upward departure, not to factor in a two point upward adjustment for abuse of trust as recommended by Probation, and to permit the Appellant to

request a downward departure based on his cooperation and his gambling addiction. Apdx C-15-16, 27-28. The Government also explained to the Court that it stood by its plea agreement and was not requesting an upward departure. Apdx C-16. The court however, applied a two point upward adjustment, over defense's objection, for abuse of a position of trust, pursuant to Probation's recommendation, which yielded an offense level of 18 and would result in a period of incarceration of 30-37 months. Apdx C-27-30.

The Court heard from several victims in this case regarding the offense but none of the victims testified under oath. Prior to hearing from the victims, Counsel for Petitioner requested that the Court base its decision to upwardly depart on sworn testimony. Apdx C-15. However, the court proceeded without swearing in the witnesses and without ruling on the Petitioner's request. Thus, the Court did not conduct a "sentencing hearing" as the Second Circuit indicated in its decision and order of September 25, 1998. The majority of the victims who addressed the court regarding the effect of the Appellant's acts, stated that the Appellant should not receive a jail sentence in order that he be able to make restitution to his victims. Apdx C-16-25.

On October 23, 1997, prior to the announcement of the Court's sentence, the Petitioner addressed the Court's contemplation of an upward departure. Petitioner argued that although there was a great deal of anger at the Appellant, there were no statements by any of the victims indicating they

were in danger of insolvency as a result of the Appellant's actions. Appellant also argued that the Sentencing Guidelines took into consideration the punishment that should be imposed in these types of cases by increasing the sentence based on the amount of the fraud. Apdx. C-30-32. Despite Petitioner's arguments, Judge Parker sentenced the Petitioner to a fifty-five (55) month term of imprisonment instead of the range of 24 to 30 months contained in the plea agreement. Apdx C-33-34.

C. Petitioner's Second Circuit Appeal

On appeal to the United States Court of Appeals for the Second Circuit, the Petitioner raised several arguments of which the following are relevant for the purposes of this petition: (i) the District Court's sentencing of the Petitioner without conducting a sentencing hearing violated the Petitioner's constitutional right to due process of law (this argument was contained in the Petitioner's Reply Brief); and (ii) the District Court did not have the authority to upwardly depart in sentencing the Petitioner, pursuant to Note 10(f) of U.S.S.G. Sec. 2F1.1.

The Petitioner's appeal was submitted to a three-judge

panel consisting of Circuit Judges Jose A. Cabranes,and Rosemary S. Pooler and District Judge David G. Trager. In a decision and order dated September 25, 1998, the Court affirmed the judgment and sentence of the district court. Apdx A-1-6.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS ON AN IMPORTANT SENTENCING GUIDELINES PROVISIONS CONCERNING THE METHODS REQUIRED IN RESOLVING DISPUTED SENTENCING FACTORS WHICH AFFECT AN INDIVIDUAL'S DUE PROCESS RIGHTS

In this case, the Second Circuit held that there is no requirement that the district court base its factual determinations on sworn testimony. Apdx A-4. Similarly, in United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991), the court held that the sentencing court is under no duty to conduct a "full-blown" evidentiary hearing every time a defendant contests a fact in a pre-sentence report. However, the decisions of this circuit appear to be in conflict with those

of other circuits on this issue. Specifically, in United States v. Needle, 72 F.3d 1104 (3rd Cir. 1996) the court held that judicial speculation cannot provide the basis for an upward departure where the court based the departure not on sworn testimony but on an unsupported judicial conclusion. In addition, in Jimenez Martinez, *supra*, the First Circuit found error in the district court's denial of defendant's motion for an evidentiary hearing given the questionable reliability of the affidavit on which the district court relied at sentencing. The Tenth Circuit, in United States v. Roberts, 14 F.3d 502, 521 (10th Cir. 1993), also remanded a case due to the district court's failure to hold and evidentiary hearing regarding the defendant's objections to a disputed factor. Since there should be a uniform method of resolving sentencing disputes, this Court should resolve the split in authority among the courts of appeals concerning Section 6A1.3 of the United States Sentencing Guidelines and the method of conducting an evidentiary hearing.

A. The District Court's sentencing of the Petitioner, without conducting a hearing to resolve the disputed issue pertaining to the upward departure pursuant to Note 10(f) of Section 2F1.1 of the United States Sentencing Guidelines, violated the Petitioner's

constitutional right to due process of law.

The federal sentencing guidelines make clear that "when any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." U.S.S.G. Sec. 6A1.3(a) In addition, although "written statements of counsel or affidavits of witnesses may be adequate under many circumstances," in other instances, "[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues." Guidelines Sec. 6A1.3 Commentary; *See also,* United States v. Jimenez Martinez, 83 F.3d 488, 494-495 (1st Cir. 1996);United States v. Ibanez, 924 F.2d 427, 430 (2d Cir. 1991).

The facts in this case clearly demonstrate that the only reliable method to resolve the disputed issue of whether the Petitioner knowingly endangered the solvency of one or more victims was by conducting an evidentiary hearing with sworn testimony. On October 20, 1997, prior to the sentencing, the court heard from several victims in this case regarding the offense but none of the victims testified under oath. Apdx C-16-25. Prior to hearing from the victims, Counsel for Petitioner requested that the Court base its decision to upwardly depart on sworn testimony. Apdx C-15. However,

the court proceeded without swearing in the witnesses and without ruling on the Petitioner's request. Thus, the Court did not conduct a "sentencing hearing" as the Second Circuit states in its opinion of September 25, 1998. Apdx A-4.

Although the Petitioner addressed the substance of the victims' statements to the Court that day, he did not have the opportunity to cross-examine the victims. If counsel for Petitioner had been permitted to cross-examine the victims who addressed the court, he would have been able to prove that none of the victims became insolvent or in danger of insolvency as a result of the Petitioner's acts, which was clearly in dispute. In fact, he would have demonstrated that Petitioner made restitution payments to a great number of the victims prior to his arrest in this case.

The Court's decision to sentence the Petitioner without conducting an evidentiary hearing based on the facts in this case was clearly erroneous and resulted in violating the Petitioner's due process rights. An evidentiary hearing was the only reliable way to resolve this disputed issue since the upward departure the Court was contemplating was so excessive and would result in doubling the Petitioner's sentence. However, the court did not rule on the Petitioner's request to swear in the victims who addressed the court prior to the sentencing and the statements that they made were not

made under oath thus preventing the Petitioner from cross-examining them. The Petitioner's sentence was increased from the 24-30 months provided for in the plea agreement to 55 months, without due process of law. Therefore, the Petitioner's sentence must be vacated, or in the alternative, the matter must be remanded to the district court to conduct an evidentiary hearing.

B. The District Court did not have the authority to upwardly depart in sentencing the Appellant, in violation to the Petitioner's constitutional right to due process of law.

In this case, the District Court did not have the authority to upwardly depart under Application Note 10(f) to U.S.S.G. Sec. 2F1.1 since there was no reliable evidence that the Appellant's conduct involved the knowing endangerment of the solvency of one or more victims. All we heard were statements by the victims expressing their anger at Petitioner and the overwhelming desire to obtain restitution. There was no evidence that the Petitioner's conduct left any of the victims insolvent or in danger of insolvency. The government did not introduce any financial records of the victims to support this. In fact, the government did not ask for an

upward departure in this case. The government repeatedly expressed that it was standing by the plea agreement. Apdx C-16. It is apparent that the court's conclusion that the Petitioner knowingly endangered the solvency of one or more victims was based on statements that were "speculative, unsupported and unreliable" which cannot provide the basis for an upward departure. *See,* Rivalta,892 F.2d 223 (2d Cir. 1989), *cert. denied,* 502 U.S. 875, 112 S.Ct. 215 (1991).

In addition, a district court may impose upward departures under the Sentencing Guidelines only when it "finds that there exists an aggravating...circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. Sec. 3553(b) (1997); *see also,* United States v. Mandel, 991 F.2d 55 (2dCir.1993). Application Note 10 U.S.S.G. Sec. 2F1.1 provides a list of circumstances in which an upward departure may be warranted where the base level for the offense " does not fully capture the harmfulness and seriousness of the conduct." The record in this case does not support a finding that the monetary loss did not fully capture the harmfulness and seriousness of the Petitioner's conduct thus warranting an upward departure. Both the offense level for fraud and the adjustment for more than minimal planning

in the plea agreement had already taken into account the harm to the victims. The Appellant's base offense level was increased by eleven points for the amount of the fraud and by an additional two points for more than minimal planning. By sentencing the Appellant to 55 months imprisonment, instead of the range of 24 to 30 months provided in the plea agreement, the court was punishing the Appellant for fraud amounting to more than 40 million dollars, instead of the 1.5 million he was convicted of.

Furthermore, the court stated that one of the reasons for upwardly departing was the fact that the Petitioner owed a fiduciary obligation to the victims as their accountant. This factor was already taken into consideration by the court when it adopted the two point adjustment recommended by probation for the abuse of a position of trust pursuant to section 3B1.3 of the sentencing guidelines. This increased Appellant's offense level from the negotiated level of 16 contained in the plea agreement to a level 18. Apdx C-27-30. Therefore, the court could not consider this basis twice under two different categories for an upward departure.

The doubling of Petitioner's sentence was improperly based on unsworn testimony and judicial speculation. In addition, the court did not have the authority to impose such

a severe sentence. Therefore, Appellant's sentence must be vacated and the matter remanded for re-sentencing.

CONCLUSION

For the foregoing reasons, Robert Van Zandt's petition for a writ of certiorari to the Second Circuit should be granted.

Respectfully submitted,

SCOTT BRETTSCHNEIDER
Attorney for Petitioner
Robert John Van Zandt

80-02 Kew Gardens Road
Suite 701
Kew Gardens, New York 11415
(718)575-2929

December 22, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight.

PRESENT:

JOSE A. CABRANES,
ROSEMARY S. POOLER,
Circuit Judges,
DAVID G. TRAGER,*
District Judge,

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*Of the United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT VAN ZANDT, JR.,

Defendant-Appellant.

APPEARING FOR APPELLANT: Scott Brettschneider, Kew Gardens, NY

APPEARING FOR APPELLEE: Barbara Guss, Assistant United States Attorney, Southern District of New York (Mary Jo White, United States Attorney, Dietrich L. Snell, Assistant United States Attorney, on the brief)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Barrington D. Parker, Jr., judge), and was submitted.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Robert Van Zandt, Jr. appeals from a sentence imposed by the district court following Van Zandt's plea of guilty to two counts of mail fraud, in violation of 18 U.S.C. § 1341. The district court sentenced Van Zandt to 55 months' imprisonment, to be followed by a three-year term of supervised release, and in addition ordered Van Zandt to pay restitution in the amount of $1,568,100. By the district court's calculation, the Sentencing Guidelines called for a prison sentence of 30 to 37 months. However, after giving notice to the parties, the district court departed upward by 18 months, pursuant to U.S.S.G. §2F1.1, application note 10(f) (upward departure may be warranted if loss calculation underestimates seriousness of defendant's conduct and "the offense involved the knowing endangerment of the solvency of one or more victims").

On appeal, Van Zandt argues: (1) that the district court lacked the authority to depart upward pursuant to U.S.S.G §2F1.1 because the evidence supporting the upward departure was insufficiently reliable; (2) that the extent of the upward departure was unreasonable; (3) that the district court's justification of the upward departure was procedurally flawed; and (4) that the district court abused its discretion by refusing to depart downward on the basis of Van Zandt's "extraordinary" acceptance of responsibility. These arguments lack merit.

First, after a careful review of the record, we conclude

that there was a sufficient evidentiary basis for the district court's determination that Van Zandt knowingly endangered the solvency of one or more victims. At the sentencing hearing, the district court react into the record letters from two victims who indicated that, on account of Van Zandt's fraud, they had lost all of their money. Another victim testified at the hearing that she was close to losing her home. Moreover, to support its determination that the harm was inflicted knowingly, the district court noted that the victims were all people in respect of whom Van Zandt had a fiduciary obligation. Van Zandt had full notice of these issues and was able to address them at the hearing. Moreover, contrary to Van Zandt's contention, there is no requirement that the district court base its factual determinations on sworn testimony. U.S.S.G. §6A1.3(a) and the relevant commentary indicate that the district court may consider information from any source, so long as the court satisfies itself that the information is reliable. We further note that, although Van Zandt's counsel did suggest at one point that perhaps the district court should take sworn testimony, at the close of the hearing counsel did not ask that the court conduct further factfinding. In sum, our review of the record gives us no reason to doubt that the district court in this case took steps to assure itself of the reliability of the information it considered. Nor do we see any reason to disturb the district court's conclusion that Van Zandt's was an unusual case that warranted an upward departure.

Second, we do not believe that the extent of the departure was unreasonable. In light of the clear evidence that Van Zandt knowingly and without any justification endangered the solvency of many of his former clients, an 18-month upward departure was not excessive. Moreover, we agree with the district court that endangering the solvency of the victims was not encompassed in Van Zandt's underlying base offense level.

Third, the district court's justification of the upward departure was not procedurally flawed. The district court properly gave notice of its intention to depart, allowed Van Zandt the opportunity to present relevant argument and evidence, and then fully explained the reasons for its departure. Moreover, we do not accept Van Zandt's contention that the district court erred by failing to specify the offense level to which it was departing. *See United States v. Thomas*, 6 F.3d 960, 965 (2d Cir. 1993) (explaining that Second Circuit caselaw does not require adherence to mechanistic procedure in vertical departure cases).

Finally, Van Zandt has failed to demonstrate that the district court's refusal to depart downward was based on either legal error or a misapplication of the Guidelines. Accordingly, that decision of the district court is unappealable. *See United States v. Lawal*, 17 F.3d 560, 562 .(2d Cir. 1994).

The judgment and sentence of the district court are

AFFIRMED.

For the Court,
Carolyn Clark Campbell, Clerk
by */s/Lucille Carr*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff

-against-

ROBERT J. VAN ZANDT,
Defendant.

BARRINGTON D. PARKER, JR., U. S. D. J.

The Court is considering an upward departure pursuant to U. S. S. G. § 2F1.1 note 10(f). Counsel shall supply chambers with written responsive submissions, if any, by 12:00 noon, October 8, 1997.

SO ORDERED
/s/Barrington D. Parker, Jr.
BARRINGTON D. PARKER, JR.
U. S. D. J.

Dated: White Plains, New York
October 2, 1997

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Letter from the Law Offices of Philip R. Edelbaum

October 16, 1997

Hon. Barrington D. Parker, Jr.
United States District Judge
300 Quarropas Street
White Plains, NY 10601

Re: United States V. Robert J. Van Zandt
97 Cr. 496-01 (BDP)

Dear Judge Parker:

I am submitting this letter in response to your Honor's Order of October 2, 1997, wherein it stated that the Court is considering an upward departure under *United States Sentencing Guidelines* § 2F1.1, comment (n.10f), which states that a departure may be appropriate if *"the offense involved the knowing endangerment of the solvency of one or more victims"*.

I do not believe that there should be an upward departure for the basic reason of none of the investors qualify as to endangerment of insolvency. I will deal with the letters to probation, one at a time. After reading what I have to say about each investor, *a Fatico* hearing might be necessary,

since the Court cannot make a upward departure under § 2F1.1 comment (note 10), based on speculation, but should be on sworn testimony. See: *United States v. Needle* 72 F3d 1104 (3rd Cir. 1995)

1. John & Zora Sormeley & John Sormeley Jr.: Mr. Sormeley, despite what he says is in his letter is financially quite well off. He does collect Social Security, but he gathered sufficient net worth, to the extent that some people might call him wealthy. He is able to support his adult son John Jr. who has not worked for years, even before his automobile accident. In fact when the Sormeleys invested with Robert John Van Zandt Mr. Sormeley asked him to hire his son, who had been out of work for a long time. John was being supported by his father when he invested the money that he did. The Sormeleys have signed the letter requesting that Mr. Van Zandt be given a non-jail sentence, so that they would have a better chance of recouping their investment.

2. Bruno O. Nunez: Mr. Nunez cannot read or write English. The letter that was sent to you was written by his daughter and signed by Mr. Nunez. Mr. Nunez told me that he did not write the letter, his daughter did and he signed it. He told me that he did not mean to indicate that he wished to see Mt. Van Zandt go to jail. What he would like is that Mr. Van Zandt receive a sentence that would insure restitution as quickly as possible. Mr. Nunez has other funds, some of which were invested in mutual funds through Mr. Van Zandt's

father.

3. Katherine and Joseph Pampalone: In her letter Katherine Pampalone discusses her sister, Mary Sormeley who she bought a house with. Mrs. Pampalone discusses that the lost investment prevented and/or delayed fixing up the house that was bought. Mr. Van Zandt is familiar with Ms. Sormeley's finances, because he obtained the mortgage for the house. At the time of the purchase or the house, Ms. Sormeley had $80,000.00 in the bank and could have well afforded to fix up the house and was not prevented by her loss of $10,000.00. Mr. and Mrs. Pampalone and all the relatives mentioned in the letter have signed the letter requesting your Honor impose a non-jail on the defendant, so that he can make restitution.

4. Eileen Moore: Ms. Moore has also signed the letter, requesting that your Honor not send Mr. Van Zandt to jail, so that he may make restitution starting now and not delay it.

5. Eleni Stratis: Ms, Stratis has not been left destitute by the loss of her investment, I am led to believe that Ms. Stratis has invested substantial monies in Greece. Ms. Stratis has also signed the letter requesting a non-jail sentence, so that Mr. Van Zandt can make restitution as early as possible. Ms. Stratis intends to attend the sentencing.

6. Lisa & Douglas Reynolds: The Reynolds family has not been left destitute by the actions of Mr. Van Zandt and have also signed off on the letter requesting a non-jail sentence so that Mr. Van Zandt can promptly make, restitution

7. The Pargament family: The Pargaments have also not been left destitute and have signed the letter requesting a non-jail sentence for Mr. Van Zandt so that he can promptly make restitution.

8. Arthur May: Mr. May say that Mr. Van Zandt prevented his buying a retirement home in Wisconsin. I would like to point out to you Honor that the defendant, when sue by Mr. May, did not contest the lawsuit, and instead, signed a confession of judgment, Mr. Van Zandt was making payments under the agreement until early 1995, when New York State revoked his brokers license and his income dropped, Mr. Van Zandt had paid back in excess of $70.000.00 reducing the amount he owed Mr. May to $79,000.00. The money was not being paid from monies taken from other investors, but out of the profits of his business. Mr. May lost $350,000.00 in investing in mortgages with Lawrence Watkins, before he ever invested with Mr. Van Zandt. Mr. Watkins was sentenced to jail and ordered to pay restitution. Since being out of jail he has been unable to obtain a position which would enable him to make restitution.

This brings me to a point which is appropriate to make now. In the past few years there were two other people who

were convicted of the same crime as Mr. Van Zandt. Both were mortgage brokers who diverted the investment money to their own pockets instead of investing it in mortgages, Lawrence Watkins and Ralph Dililo. Neither one was a compulsive gambler, as Mr. Van Zandt was. With, Mr. Watkins it appeared to be pure greed.

Both man received jail sentences and ordered to pay restitution. Both men have finished there jail sentences and have been unable to make, restitution due to inability to obtain employment that would enable them to.

I have been in practice in excess of 35 years. By now, I have a lot of friends on the bench and I am aware that one of the most difficult decision for a Judge to make, is what sentence to impose. Here there must be a balance of punishment for Mr. Van Zandt and restitution for the victims.

I am afraid if there is pure punishment for Mr. Van Zandt, it will most likely delay the restitution for a long time, since after getting out of prison, Mr. Van Zandt would not have a business to return to, and would have to obtain employment.

I have asked for a downward departure in my letter of September 5, 1997, to Probation, which I copied the Court. In addition to the people named above I have sent the Court letters, signed by victims, requesting a non-jail sentence so

that Mr. Van Zandt could make restitution more quickly. In addition to Ms. Stratis and Ms. Quinn, Susan Sullivan, Fred Locantore, and Josephine Militana intend to be present at the sentencing and request a non-jail sentence so that restitution be made more quickly.

I have met with the officials from New York State Banking Department and they have told me that, if Mr. Van Zandt is given a non-jail sentence and successfully completes a year of supervised release, while making restitution, they would listen and evaluate an application for Mr. Van Zandt to be employed by a Bank. He would not be getting his brokers license again but would be allowed to process mortgage applications and receive commissions. This would also require his successfully stay in Gamblers Anonymous.

I propose an unusual solution to what to do with Mr. Van Zandt.

1. I suggest that sentence be postponed for six months and the defendant ordered to pay monthly restitution according to the proposed schedule in the pre-sentence report that I submitted to the Court. That would show the Court whether or not the defendant is capable of making restitution as proposed. Mr. Van Zandt would waive any right to a speedy sentence.

2. According to the schedule it would be impossible

for Mr. Van Zandt to repay the entire amount in five years. Probation or supervise release sentences cannot be made to run consecutively. I am requesting that your honor sentence him to two five year periods of supervised release. Mr. Van Zandt would waive his right to appeal such sentence for all time, including if he was cited for violation of the terms of supervised release after the first five year period.

I would like to stress that again, that now that Mr. Van Zandt is active, in Gamblers Anonymous and receiving private therapy, he is amazed at how much more productive, he is, besides not needing money to support his compulsive gambling. I understand this is common among recovering compulsive gamblers and why I have asked the Court permission for one of Mr. Van Zandt's sponsors at Gamblers Anonymous be allowed to address the Court at sentence.

Very truly yours,
/s/ Philip R. Edelbaum
Philip R. Edelbaum

cc: Barbara Gus, Esq.
Assistant United States Attorney
Kathleen A. Erickson
United States Probation Officer

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MR. EDELBAUM: Now, Your Honor, Your Honor did enter an order that Your Honor was considering an upward departure.

THE COURT: That is correct.

MR. EDELBAUM: Is Your Honor still considering the upward departure?

THE COURT: I'm still considering an upward departure.

MR. EDELBAUM: Your Honor, may I address that?

THE COURT: Yes.

MR. EDELBAUM: There are victims in the court who I believe wish to address the Court, wish to make statements on that. There are several victims in the court. I don't think anybody has really been placed in a precarious financial position. Some of the people I have written to, Your Honor, although they claimed in the letters that they were, they are really not, and I think that Your Honor has to decide this not on speculation or on a letter, but on something more substantial, like sworn testimony.

THE COURT: Well, let me give you an example of the kind of information that I, as a sentencing Court, received, that compelled me to ask counsel for additional submissions. I've received a letter, for example, dated August 11th, 1997, from Miss Eileen Moore. I take it from the response I got

from you you've seen the letter.

MR. EDELBAUM: Yes.

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MS. GUSS: No, Your Honor. The Government agrees with Your Honor's, analysis that you do have discretion to depart downward and that it is not warranted in this case. With respect to the upward departure, as we set forth in our letter, we will stand by the plea agreement.

THE COURT: Let me hear at this point, as I believe the law contemplates, statements by any victims who wish to be heard.

MS. GUSS: Yes, Your Honor. I believe that Mr. Ripa, who is the attorney for John May, would like to address this Court, as well as Miss Eleni Stratis.

THE COURT: All right. I would hear at this point anything that any of these individuals or their representatives might wish to say.

MR. EDELBAUM: There are other victims too in the courtroom, Your Honor -- Susan Sullivan, Eileen Quinn, Josephine Miltano, and Andrew Pargament -- who would like to address the Court.

THE COURT: Very well.

MR. RIPA: Good morning, Your Honor. My name is Glenn Ripa. I am an attorney and I represent John Arthur

May.

John Arthur May was a victim of Mr. Van Zandt's fraud. He is a 62-year-old retired police officer. He invested his life's savings with Mr. Van Zandt. Actually, the money came through his father, Mr. Van Zandt, Sr., who put Mr. May in a variety investments. Some of the investments were made through Robert John, Robert Van Zandt, Jr., who is the defendant in this case. He also put them into investments with a Lawrence Watkins, who has also pled guilty in Federal Court and was sentenced.

Between the schemes of this defendant here and Mr. Watkins, my client lost approximately half a million dollars. A $130,000 of that money was lost through the defendant in this case.

My client is a retired police officer who did not opt for Social Security during his career. He doesn't have Medicare. He doesn't have Social Security. He lives on a very, very modest police pension, takes in about $1,200 a month. He has no money left.

Mr. Van Zandt did enter into an installment agreement to repay some of the money and in fact did repay some of the money. We submitted a letter to Your Honor with respect to my client.

This is an economic crime, it's not a violent crime, and we understand that. We are interested in restitution here, Your Honor. We have a judgment against Mr. Van Zandt, and based on that we believe we should have a priority claim, because we are a judgment lien creditor with respect to this.

Obviously, most of the victims I think are very, interested in restitution because of their economic circumstances. My client doesn't have anymore money. He lives in an apartment in Manhattan and he can't afford to leave Manhattan. He wants to retire and move possibly to Wisconsin, where he can enjoy his retirement. He just doesn't have the wherewithal. So restitution is very, very important.

But unfortunately, Your Honor, there is a lot of victims in this case. My client again is a judgment lien creditor. We believe he should get priority. But if all the victims are going to get a 100 or $200 a month over a ten-year period, I don't think that's appropriate either, Your Honor. So I would just like to have the Court look at the facts and circumstances here of my client and the other clients, and weigh the opportunity of whether or not a reasonable amount of restitution can be made within a short period of time or whether incarceration is appropriate.

We would prefer restitution, Your Honor, but not over a ten-year period, and again, because he's a judgment lien creditor, we think that the judgment lien creditors in this case should get priority.

THE COURT: Thank you.

MR. RIPA: Thank you.

MR. EDELBAUM: You want me to answer individually?

THE COURT: No. Why don't you just answer when the victims have finished. Let me say something at this point which I believe applies to all or virtually all of the victims.

As a sentencing Court in this matter I have a number of responsibilities that are driving the difficult decision that I have to make this morning. One, of course, is restitution to the victims, which of course is required in principle by controlling law, but the other factors that I have to consider are, number one, promoting respect for the law, and, number two, insuring that Mr. Van Zandt is appropriately punished under the circumstances of his offense. So I make those remarks so that each of you who speaks to the Court knows the kinds of things that I have to consider in. . . .

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THE COURT: All right. Is there anyone else who wishes to be heard?

MR. EDELBAUM: Yes, Your Honor, Susan Sullivan.

MS. SULLIVAN: I guess I have been in worst situations. I was a long-time friend of Robert's father and I trusted him in this investment. When the investment was turned over to his son, I trusted that it would be continued to be handled properly, since all of the matters that I had had with him in the past were.

When I realized there was something wrong was pretty much into the beginning, because there were problems with the law, with the checks coming -- checks bouncing, a lot of

problems, and I was just -- I didn't know what to do. I really didn't know what to do. It went on to the point where, finally, I realized that it was definitely fraud. How I found that out was from the first of three attorneys that I spoke with. First of whom was again a long-time friend and basically a criminal attorney, and his advice to me was, "Lock him up." You know, "Lock him up." The second attorney I spoke to was a friend of a friend, who is a judge, and he said to me, "You are not going to get your money back. Your money is gone." And the third person I spoke to was a real estate attorney, and he probably had the most practical advice, which was, "It's better for him not to serve time and to try to pay the money back, whatever it is, than not to give anything back at all."

I guess I am also in a peculiar position. When I started this investment, when I originally invested I was fairly well off, at this point I'm not, and I'm faced with perhaps early retirement on disability, because of the health issues that are starting to arise, and that's something that I have to look at.

My son also is a victim in this and he has more or less backed what I'm saying here, in that, I can understand how the mother felt, because you feel double-betrayed, but as I suffer from a similar health problem, and I do believe that compulsive destructive behavior, whatever form it takes, is a real health issue, I understand that. When it's going on, the denial is so strong that you are not aware of what you are doing. You truly believe your own deceptions and, your own illnesses. And I learned that even though at the time you are not responsible, you certainly are accountable, and this

individu: he will be accountable for life for the lives he has destroyed. ıe lives that perhaps he can help if he is allowed to earn a living and to pay back this money. And I understand the responsibility of the Court in needing to penalize individuals who break the law. I don't know what to say. I've come to the point of forgiveness, first, myself for being -- not looking at it closer and not being a wiser investor, which I certainly should have been. If anything, that's the one benefit I did get. I do assume responsibility for my own monies, my own investments. I don't go into things blindly.

On the other hand, of course, I realize that the justice has responsibility, but I can't see the point of destroying the person's life and not allowing them to make restitution, that just doesn't make sense. All the lives that have been affected here and have been affected not to the better, certainly, in most instances, I just can't see the need to prolong it and to cause more damage. As a person who suffered and as a person who had lost, I just don't understand that, but then, again, I'm not a judge and I'm not in the legal system.

On the other hand -- and like I said, there is even evidence, clinical evidence with children after infections that compulsive behavior does happen, does stay with the individual for life. So I really truly believe that these compulsive disorders that are immensely destructive to society are medically based and perhaps someday can be helped in the form of prevention before the harm occurs or the damage occurs. Thank you.

THE COURT: Thank you very much.

MR. EDELBAUM: Eileen Quinn.

THE COURT: While you are coming up, Miss Quinn, let me share with counsel, for the record, another letter I believe that you have seen.

This is from Mr. John Sormeley. The letter is dated July 30th, 1997, and directed to the Justice Department, and it reads: "I had $5,000 and I invested the entire $5,000 with Robert J. Van Zandt, so I might make more money through interest than from the bank. Since that time I was in a car accident and I am, unemployed. Now I have to suffer with no money. I had to borrow $7,000 to live, as I have no income. I can certainly use the money now in my dire need. Respectively yours, John Sormeley."

Have you seen that one?

MR. EDELBAUM: Your Honor, I answered that letter in my letter.

THE COURT: I believe you did. I just wanted the record to be complete.

MR. EDELBAUM: The father of Mr. Sormeley has been supporting him for many years. At the time of the investment he was unemployed, not just since the accident. He has always been unemployed. He has not worked for many years. In fact, Mr. John Sormeley, Sr., at the time asked Mr. Van Zandt if he could give John Junior a job.

He is one of these people who just doesn't work. The father is quite well off, Your Honor, and has substantial monies, not just living on Social Security, and he's been supporting his son before the investment, and after the

investment has not changed anything.

THE COURT: Thank you.

MS. QUINN: In 1991, I invested $20,000.

THE COURT: Could you just, again, ma'am, state for the record your name?

MS. QUINN: Eileen Quinn.

THE COURT: Yes, ma'am.

MS. QUINN: I invested money with Bob in 1991. '92, $20,000. Up until last year, I was getting my interest checks, and then they stopped, and I kept calling him and I got no answer, and then I found out about this case.

Bob -- I know Bob and his father not that well as some of the people here know them, but they always represented themselves very well to me. I feel if he does go to jail, I am out my money. I know the law states that he still has to pay it back when he comes out, but he won't have a job, and where is he going to have a job for 30,000?

I prefer to see him on probation and then paying back so much money to his investors. Thank you.

THE COURT: Thank you, ma'am.

MR. EDELBAUM: Joseph Miltano, Your Honor. Josephine Miltano.

MS. MILTANO: My name is Josephine Miltano. I invested money with Robert in 1992. I was getting my checks faithfully up until a year ago and I kept calling him, so he said he would send me a check. And to my knowledge, if he goes to jail, I don't get my money. So to me, I would give him a break to pay back people that are out of money.

THE COURT: Thank you.

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MR. EDELBAUM: Yes, Your Honor. Before I answer that, Your Honor, a few years ago, when Mr. Van Zandt was originally arrested in the Bronx and had been charged, he went to the Bronx District Attorney's Office and admitted these frauds that are now before Your Honor. The Bronx District Attorney's office never acted on that. I did not represent him at that point, Mr. Lewis Alperin did, and he would like to explain to Your Honor what happened then.

THE COURT: What is this relevant to?

MR. EDELBAUM: I think it's relevant, Your Honor, that he has always showed that, from the very beginning, that he did wrong and wanted to make amends. This is about two years ago and I think, I think what happened then is relevant.

THE COURT: Well, let's finish hearing from the victims first then.

MR. EDELBAUM: I think that's it, Your Honor, unless there are other victims. I don't know.

THE COURT: Was there another hand in the back? I thought I saw it.

MR. SUAREZ: Yes. Good morning, Your Honor. My name is Carlos Suarez. I invested about $20,000, which was everything I had ever saved up, and Robert invested

5,000 of it for me in mutual funds and $15,000 in Colossal. Those $15,000 was my chance one day to have my dream house and own it.

Ever since the beginning checks have been bouncing. I can never get him on the phone. It was always one excuse or another. I had a feeling something like this was going to happen, but there was nothing I could do at the time until, finally, I heard about this.

More than anything else I want him to go to jail. If anything, to rot for the rest of his life. But that $15,000 that I did invest in Colossal was all I ever had. Right now I am on compensation, I barely get, $600 a month, and I would like to get some of my money back. So the only way I can see that I can get my money back it is if he does get probation, even though I want him to go to jail more than anything else, because I don't see my dream coming true of owning a house without at least having to start again. I thought that was my start. Thank you.

MR. EDELBAUM: Your Honor, starting with Mr. Suarez, who was last, Mr. Van Zandt has made $2,000 restitution of the $15,000. His $5,000 investment that was placed in a mutual fund is now worth approximately $7,000 and still growing.

As to Mrs. Stratis, Your Honor, I am in an awkward position. I'm aware of other money she has and other income, other investments she has, because Mr. Van. . . .

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MR. EDELBAUM: After Mr. Watkins was found out to have diverted the money to his own use, Mr. May I believe invested in another corporation with Mr. Watkins in Connecticut, which was then put out of business by the State of Connecticut to try to recoup his losses, but Mr. Van Zandt did make restitution, approximately $70,000, to Mr. May before he lost his brokerage license as a mortgage broker in approximately two years ago, when the State Banking Department revoked his mortgage brokerage license.

And also, Your Honor, as to the plea agreement, the Government in negotiating the plea agreement was aware of a lot of the victims, and because of what he did in cooperating with the Government, his offer of cooperation, there was -- two things were done. The Government agreed not to ask for an upward departure, and taking that into consideration, taking into consideration the fact of his compulsive gambling and his -- now he has gone into Gamblers Anonymous and is receiving therapy, and they also decided not to factor in the two points for abuse of trust. That was a decision that was made by the Government because of his actions.

They also allowed me to make my motion for a downward departure, which Your Honor knows is unusual. In those other cases that have come before Your Honor, the agreement states that the defendant may not make a motion for downward departure. They were well-aware of

everything. They did this because of the unusual nature of his cooperation, the unusual nature, and the fact that he is now trying to recover.

Your Honor, also, under the agreement he has to make a payment of $50,000 at sentencing. I told him that the checks have to be certified. He is upset. We forgot to have them certified. He can have them ,certified and bring them to the court, whichever the Court wants to do, but those checks will be paid.

Now, neither Mr. Watkins or Mr. **Delillo, who are also in similar situations, neither one of them made any kind of restitution downpayment on sentence, neither one had a compulsive gambling problem, both basically did this from pure greed, and they received I believe 27 months. I think that an upward departure here in view of what happened to the others, in view of his really trying to better himself, focus himself with Gamblers Anonymous, I think will be wrong.

I know that Mr. Van Zandt would like to speak. . . .

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MR. EDELBAUM: In Paragraph 21, the Probation officer adds two points for abuse of trust, and this is what I've discussed before. The Government and I had gone over this. Your Honor, of course, under the Sentencing Guidelines has the power to accept or reject a plea agreement, but the plea

agreement here was made considering many factors, and the Government says it still stands by the plea agreement.

Many times Your Honor knows that the Government is allowed to argue what the Probation Department comes up with, but because of Mr. Van Zandt's unusual and extreme acceptance of responsibility, he is saving between 40 and 90 hours of investigation to the Government, which is a considerable amount of time. They are still saying, "We stick by the plea agreement and the sentencing range in the plea agreement."

And also, his offer, Your Honor, to cooperate about the bookmakers, his offer, Your Honor, wasn't just to give the names, but we had offered to wear a body wire. It's just that the FBI did not feel that the bookmakers that he was dealing with were big enough fish to go after, so the offer of cooperation was rejected, but the Government considered that in what we did and considered everything under the circumstances in going into the agreement.

So I really think that Your Honor should give consideration and consider the plea agreement that was worked out between the Government and myself, not upwardly depart, and sentence within the Guideline range of the original agreement.

And see, what upsets me in all of these cases, Your Honor, is both Watkins and *Delillo, they both are out of jail, they both received jail sentences, and neither one has been able to make restitution, because. . . .

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MR. EDELBAUM: No, Your Honor.

THE COURT: Very well. With the correction that we've just made, the findings of fact in the presentence report are the findings of fact for this Court for the purposes of sentencing.

I note that for purposes of sentencing these are the Court's Guidelines computation: There is a base offense level of six. There is an 11-point enhancement due to the amount of the loss. Of course, the amount of the loss is $1,453,000.

We next come to the two-point enhancement that Mr. Edelbaum has just discussed. I believe that that enhancement is appropriate under 2F1.1(b)(2). I am sorry, this is one which was not addressed. There is a two-point increase under 2Fl.l(b)(2) because of more than minimal planning.

There is an additional two-point increase as a result of abuse of a position of trust. I believe, looking at the facts of this case and the application notes, that even though it was not in the plea agreement it was warranted.

That leads to an offense level of 21. There is a reduction of three points for acceptance of responsibility, yielding a total offense level of 18; there is a criminal history category of two, for a Guideline range of 32 to 37 months.

MR. EDELBAUM: At what point does Your Honor want to hear from Mr. Van Zandt?

THE COURT: I will hear from him in just one second. Let me just indicate for the record that, as I previously informed counsel, I am contemplating an upward departure under 2F1.1 Note 10, based on what I've heard this morning and based on the presentence report, the listing of victims, the character of the information that I've received from victims and concerning victims.

I conclude that this case involves an offense that involved knowingly endangering the solvency of one or more victims. It is not necessary to make them destitute. It's not necessary to coerce bankruptcy. The test here is knowing endangerment of insolvency. I believe that the record here amply reflects that has been proved.

So, at this point, Mr. Van Zandt, let me hear from you with respect to anything you want to say in connection with the sentencing.

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MR. EDELBAUM: And I know that there are proposed amendments to the guidelines in the fraud area, basically doing away with the minimum participation, because any minimal planning -- because any fraud has more than minimal planning, and, basically, in doing away with that is adding two points to the fraud table, as a practical matter.

I'm also aware of the fact that there is a great dispute among not only your colleagues but among the Bar that the guidelines themselves in many areas are wrong. In certain areas they are too high. In the narcotics area, the crack area, especially in the crack area, they are draconian high.

Several of your colleagues on the bench who have reached senior status refuse to take narcotics cases because they feel they cannot abide by the law in sentencing them within the guidelines. In other areas, a lot of your colleagues and a lot of the bench feel that the guidelines are too low, and certain people feel that in the fraud area, the guidelines are too low. But the Court is still bound by the guidelines, and unless a case is outside of the heartland of the guidelines, your Honor should not depart.

And from what I heard on Monday, there was no statement where anybody was in danger of insolvency because of the defendant's actions. There was a lot of anger at the defendant because he abused their trust. They knew his father. They knew him. They trusted him.

Mr. Sormeley was angry at me for mentioning he supported his son. He said he is on a fixed income. Yes, he is on a high fixed income. He has investments and he is able to support his son. No one said that they were in danger of insolvency. And any time there is a fraud, people are hurt financially, and the guidelines take that into consideration by having a table where the higher the amount of fraud, the higher the sentence.

And I think if -- under the present record, if your

Honor departed upward it would be going outside the heartland of the Guidelines as the appellate court discusses.

Secondly, your Honor, I'm placed in a very awkward and unusual position here. A lot of the victims have contacted me and talked to me. I have submitted to your Honor forty letters from forty of the victims, stating that although they were angry at the defendant, they would prefer a nonjail sentence, so they can see some restitution.

No one is here really to speak for them. And any type of jail sentence or lengthy jail sentence endangers them more than they have already been endangered. some of the people are elderly, and they could die before the defendant ever gets out of jail and starts to make restitution.

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THE COURT: So, Mr. Van Zandt, let me indicate the sentence that I intend to impose. Please rise.

I have already indicated that you will be ordered to make restitution in the amount of $1,568,100. That will be paid at the rate of 30 percent of your gross monthly income, and there is, of course, a $100 special mandatory assessment.

You have a right to appeal the sentence I impose. The appeal should be lodged within ten days of the judgment of conviction. Your attorney can file the notice of appeal for you or Mr. D'Agostino can file the notice of appeal for you and you can proceed at no cost, if that is necessary.

But, Mr. Van Zandt, it will be the judgment of this Court that you be remanded to the custody of the Bureau of Prisons for a period of 55 months. Following that time, you will be on supervised release for three years. I am not fining you in view of the substantial restitution obligation.

As a condition of supervised release, you shall not commit another state, federal or local crime; you shall not illegally possess a controlled substance; you shall not possess a firearm or destructive device.

You will be required to provide the Probation Office with all requested financial documentation. You will be precluded from opening any new lines of credit. You will continue your treatment for your compulsive gambling habit, and you will execute a confession of judgment in connection

with your restitution obligation.

That is the sentence I intend to impose. Do counsel know of any reason why the sentence as stated should not be imposed?

MR. EDELBAUM: Your Honor, I have already stated my objections. I feel the departure is way too high in view of the testimony. I'm asking -- I think that's beyond the heartland. Your Honor has a right to go above and beyond the agreement, but beyond that, Your Honor, I don't think that this case falls that far outside the heartland of the Guidelines, that calls for an additional 18 months over what Probation has as a maximum.

I would request Your Honor that -- Probation recommends that he is a candidate for voluntary surrender. The Government has no objection. His passport has been surrendered to the Bronx District Attorney's Office. I ask that there be voluntary surrender.

Letter from U. S. Department of Justice
United States Attorney
United States District Courthouse
Southern District of New York

May 19, 1997

Philip Edelbaum, Esq.
Room 1605
100 Church Street
New York, New York 10007

Re: United States v. Robert Van Zandt, Jr.

Dear Mr. Edelbaum:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from Robert Van Zandt, Jr. ("the defendant") to a Felony Information, charging the defendant with two counts of mail fraud, in violation of Title 18, United States Code, Section 1341. Each charge carries a maximum sentence of five years' imprisonment, a maximum fine, pursuant to Title 18, United States code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary lose to persons other than the defendant resulting from the offense, a $50 special assessment, and a maximum term of 3 yea-s' supervised release. The total maximum term

of imprisonment on both counts is 10 years' imprisonment. In addition to the foregoing, the defendant agrees to make restitution of $1,568,100 to the --- victims listed on the attached Exhibit A. The defendant further agrees to make a payment to the victims of $50,000 prior to sentencing and to make regular and substantial payments on a monthly basis thereafter.

In consideration of his plea to the above offense, the defendant will not be further prosecuted by this office (except for criminal tax violations as to which this office cannot, and does not, make any agreement) for orchestrating during the period of January 1992 through May 1993 (1) a mortgage investment fraud in which he diverted mortgage payments to his personal use and provided phony documents to investors of Colossal Funding, Inc. and (2) a mortgage broker scheme in which numerous applications for bank financing contained fraudulent and fictitious income tax information.

In consideration of the foregoing and pursuant to Sentencing Guidelines §6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. Sentencing Guideline §2F1.2 (as in effect November 1994) is applicable to the offense charged, resulting in a base offense level of 6.

2. The offense level is increased by 11 points because approximately $1,453,100 was taken by fraud.

3. An additional two points is added under §2F1.l(b)(2) because the offense involved a scheme to defraud

more than one victim and involved more than minimal planning.

4. Three points are deducted Under §3F1.1 because the defendant clearly has demonstrated acceptance of responsibility for his offense and has timely provided complete information to the government concerning his own involvement in the offense and has timely notified the authorities of his intention to enter a plea of guilty.

In accordance with the above, the applicable Guidelines offense level is 15.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has one point for his 1994 forgery conviction in New York Supreme Court, Bronx county, for which he received a sentence of five years' probation. The defendant has an additional two points for committing the instant offense while he was on probation.

In accordance with the above, the defendant's Criminal History Category is II.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated sentencing Guidelines range is 24 to 30 months.

With the exception set forth below, the parties agree that neither a downward nor an upward departure from the Guidelines range set forth above in warranted. Accordingly, with the exception set forth below, neither party will seek any

departure or mask any adjustment not set forth herein. Nor, with the exception set forth below, will either party suggest that the Probation Department consider such a departure or adjustment, or suggest that the Court sus sponta consider much a departure or adjustment. The exception is that the defendant may move for a downward departure based on his gambling addiction and his extremely early notification of his willingness to enter a plea of guilty. The Government reserves its right to oppose such a motion.

Except as provided in any written Proffer Agreements that may have been entered into between this Office and the defendant, nothing in this agreement limits the right of the parties (i) to present to the Probation Department or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Guidelines range set forth above (or such other range as the Court may determine) the defendant should be sentenced; (iii) to took an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above. Nothing in this agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility see U. S. S. G. § 3E1.1, and/or imposition of an adjustment for obstruction of justice, see U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after

signing this agreement.

It is understood that pursuant to Sentencing Guidelines § 6B1.4(d), neither the Probation Department nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Department or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. This office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is further agreed (i) that the defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Section 2255, any sentence within or below the stipulated Guidelines range and (ii) that the Government will not appeal any sentence within or above the stipulated Guidelines range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing

calculation that is inconsistent with (or not addressed by) the above stipulation. The defendant also agrees not to appeal any restitution order that is equal to or less than $1,568,100.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreements that may have been entered into between this Office and the defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement and none will be entered into unless in writing and signed by all parties.

Very truly yours,
MARY JO WHITE
United States Attorney
By: */s/ Barbara Guss*
BARBARA GUSS
Assistant United States Attorney
(914) 993-1903

APPROVED:
/s/ Cathy Seibel
CATHY SEIBEL
Assistant-in-Charge
White Plains Office

PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1 Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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Application Notes:

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10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

(a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

(b) false statements were made for the purpose of facilitating some other crime;

(c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

(d) the offense endangered national security or military readiness;

(e) the offense caused a loss of confidence in an important institution;

(f) the offense involved the knowing endangerment of the solvency of one or more victims.

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. IN such cases, a downward departure may be warranted.